

NOT TO BE PUBLISHED

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

TONY SALVADORE JIMENEZ, JR.,

Defendant and Appellant.

C085558

(Super. Ct. No. 08F07560)

In this appeal, defendant Tony Salvadore Jimenez, Jr., contends his conviction should be reversed and the matter remanded to the juvenile court for further proceedings under Proposition 57. He also contends Senate Bill No. 620 (2017-2018 Reg. Sess.) (Senate Bill 620) is applicable to his case. The People agree. We will conditionally reverse defendant's conviction and sentence and remand to the juvenile court to determine defendant's fitness for treatment within the juvenile system. Should he remain in the adult system, the trial court shall reinstate his conviction and sentence after considering exercising its discretion under Senate Bill 620.

BACKGROUND

Defendant was born in 1990 and was 16 at the time of the underlying offenses, which included several firearm enhancements under Penal Code sections 12022.5 and 12022.53.¹

His case was remanded to the trial court in December 2016 to allow defendant to make a record of information relevant to a future youth offender parole hearing pursuant to *People v. Franklin* (2016) 63 Cal.4th 261. (*People v. Jimenez* (C074048, Dec. 20, 2016) [nonpub. opn.].) At the hearing, defendant asked the trial court to vacate his conviction following the passage of Proposition 57. The court denied the request, concluding defendant's case had become final and therefore he could not benefit from Proposition 57.

Defendant timely appealed.

DISCUSSION

I

Proposition 57 Contention

On appeal, the parties agree the trial court erred in concluding defendant's case was final for purposes of applying Proposition 57 retroactively. We agree.

Before November 2016, former Welfare and Institutions Code section 707, subdivision (d) (see Stats. 2015, ch. 234, § 2) authorized a prosecutor to directly file a criminal complaint against a minor, 14 and older, in the superior court for certain offenses. (*People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 305 (*Lara*).) The prosecution did so in this case.

But following the passage of Proposition 57, a prosecutor may file criminal charges against certain classes of minors, only with the juvenile court's approval after the

¹ Undesignated statutory references are to the Penal Code.

court at a transfer hearing has considered factors listed in the statute. (Welf. & Inst. Code, § 707, subd. (a)(1).) As the parties note, Proposition 57 applies retroactively. (See *Lara, supra*, 4 Cal.5th at p. 309.)

Here, defendant's case is not yet final. (See *People v. Vieira* (2005) 35 Cal.4th 264, 306 ["[F]or the purpose of determining retroactive application of an amendment to a criminal statute, a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed'"].) We will therefore conditionally reverse the judgment and remand the matter to the juvenile court for a transfer hearing to determine defendant's fitness for treatment within the juvenile justice system.² (Welf. & Inst. Code, § 707.)

II

Senate Bill 620 Contention

The parties also contend the newly enacted Senate Bill 620 is applicable to defendant. We agree.

Prior to January 1, 2018, an enhancement under sections 12022.5 and 12022.53 was mandatory and could not be stricken in the interests of justice. (See former §§ 12022.5, subd. (c), 12022.53, subd. (h), added by Stats. 2010, ch. 711, § 5; *People v. Felix* (2003) 108 Cal.App.4th 994, 999.) Senate Bill 620 amends sections 12022.5, subdivision (c) and 12022.53, subdivision (h) to permit the trial court to strike firearm enhancements imposed under those sections. (Stats. 2017, ch. 682, §§ 1-2.)

Senate Bill 620 applies retroactively. (See *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091 [remanding pursuant to the amended Pen. Code,

² This procedure was cited with approval in *Lara*. (*Lara, supra*, 4 Cal.5th at p. 310, citing *People v. Vela* (2017) 11 Cal.App.5th 68 [review granted, opinion vacated, and transferred for reconsideration Feb. 28, 2018, S242298].)

§ 12022.53]; see also *In re Estrada* (1965) 63 Cal.2d 740, 744.) Again, because defendant's conviction is not yet final, Senate Bill 620 applies retroactively to him.

Accordingly, on remand, should the juvenile court determine defendant is the proper subject of a criminal proceeding, the matter shall be transferred to the adult court, which shall determine whether to exercise its discretion under Senate Bill 620.

DISPOSITION

We conditionally reverse defendant's conviction and sentence and remand the matter to the juvenile court for a juvenile transfer hearing, within 90 days of issuance of remittitur, wherein the court will determine defendant's fitness for treatment within the juvenile justice system. (Welf. & Inst. Code, § 707.) If defendant is found fit for juvenile court treatment, the juvenile court shall deem defendant's conviction as juvenile adjudications and impose an appropriate juvenile disposition after a dispositional hearing. (Welf. & Inst. Code, §§ 702 [§ 602 wardship determination], 706 [disposition hearing].)

If defendant is found unfit for juvenile court treatment, the case will be transferred to criminal court and his conviction reinstated. He will then be subject to resentencing on the firearm enhancements. If a different sentence results from the resentencing hearing, the trial court shall prepare an amended abstract of judgment reflecting the new resulting sentence and forward it to the Department of Corrections and Rehabilitation.

_____/s/
Blease, Acting P. J.

We concur:

_____/s/
Butz, J.

_____/s/
Duarte, J.